FILE COPY

No. 235

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner,
for the State of Oklahoma,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Answer To Brief Amici Curiae

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SUBJECT INDEX

TABLE OF CASES

TEXT BOOKS AND STATUTES

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STATEMENT OF THE CASE

The statement of the case which appears on pages 3 to 8 of the brief of Amici Curiae is substantially correct, it being specifically admitted by respondent:

(a) That the issues in the case of *Lincoln National Life Insurance Company* v. *Jess G. Read*, the Insurance Commissioner of the State of Oklahoma, et al, referred to in said brief (which case was appealed to and is now pending for decision in the Supreme Court of Oklahoma), relating to the meaning and validity of constitutional and statutory provisions of Oklahoma requiring foreign insurance companies to pay annual gross premium taxes on the premiums collected thereby in Oklahoma, "are identical", as stated by Amici Curiae, to the issues involved in this case, and

(b) That the judgment of the District Court of Oklahoma County, Oklahoma, in the Lincoln National Life Insurance Company case, from which said appeal to the Supreme Court of Oklahoma was taken, was, as stated by Amici Curiae,

> "introduced in the record of this cause by the respondent herein and constitutes a part of the record herein."

By an examination of said judgment (R-35-38) it will be found that no reference is made to the cause of action involved therein being a suit against the State of Oklahoma to which consent was not given; this for the reason that said action was a suit against the State of Oklahoma properly brought under authority of Section 12665 O. S. 1931, as construed in *Antrim Lumber Co.* v. *Sneed, State Treasurer*, 175 Okla. 47, 52 Pac. (2d) 1040 (see excerpt therefrom on page 8 of respondent's original brief herein), which case expressly holds:

> "* * *Now, therefore, that there may no longer exist any confusion* in this respect, we repeat that said section 9971, C.O.S.

> 1921 (section 12665, O. S. 1931), provides the taxpayers of this state with an ample, complete, and speedy and adequate remedy at law for the recovery of *any illegal taxes* paid by them (where not otherwise limited or specifically excepted by law), whether such payment is made to a state or municipal officer."

That the instant case was brought in the United States District Court under the purported authority of Section 12665, *supra*, is shown by the first paragraph of the "Stipulation of Facts" (R-20) which states that the sum sued for by petitioner was held by respondent

> "as provided in Section 12665 O. S. 1931",

and by the fact that petitioner expressly stated on page 29 of its original brief in the United States Circuit Court of Appeals (from whose decision the instant appeal was taken) that

> "This action was brought under permissive state legislation: Sec. 12665, O. S. 1931."

In relation to the *present force and effect* of Section 12665, as construed in the Antrim Lumber Company case, attention is called to the following argument quoted from respondent's trial brief in the Lincoln National Life Insurance Case (said argument also being set forth verbatim in respondent's trial brief in the United States District Court herein), to-wit:

> "It should be here noted that the above section [12665] was expressly repealed by Section 63, Chapter 1a, Title 68, page 333, Oklahoma Session Laws 1941, and that while the provisions thereof were re-enacted, verbatim, as Section 50 of said

Act (page 327 of said laws), *the scope of said latter section* is limited by the title of said Act to cases involving the recovery of 'ad valorem' taxes (see syllabus 3 of *Excise Board, Washita County* v. *Lowden*, 189 Okla. 286, 116 Pac. (2d) 700). However, by the same token, since Section 63 of said 1941 Act, which section expressely repealed Section 12665, was contained in an Act *whose scope was limited by its title to ad valorem taxation*, as aforesaid, and since our Supreme Court in the case of *Antrim Lumber Company* v. *Sneed, State Treasurer*, 175 Okla. 47, 52 Pac. (2d) 1040, expressly held that *said section authorized the recovery of special taxes, such as are involved here, as well as the recovery of ad valorem taxes*; it is clear that Section 12665, *supra*, was only repealed in so far as it related to the recovery of ad valorem taxes, and is still in full force and effect in so far as it relates to the recovery of special taxes, such as are involved here. That this is true is conceded by both parties hereto."

Inasmuch as the reasoning above set forth was accepted by Amici Curiae and followed by the Court in the Lincoln National Life Insurance Company case, and since said action was admittedly properly brought in a state court pursuant to the permissive provisions of said section, it was unnecessary for the judgment in said case (R-35-38), *referred to by Amici Curiae*, to state that the cause of action involved therein was a suit against the State of Oklahoma to which consent had been given.

Whether or not this Court, *if it finds that the United States District Court had jurisdiction of this action*,

should hand down a decision on the merits of the case (which will necessarily require a determination of the meaning of the Oklahoma constitutional and statutory provisions quoted and discussed in the several briefs filed herein) *while a determination of the meaning of said provisions is now pending and at issue in the Supreme Court of Oklahoma in the Lincoln National Life Insurance Company case*, is a matter which respondent leaves, without argument, to the judgment of the Court (*Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 85 L. ed. 971, *City of Chicago, et al. v. Fieldcrest Dairies, Inc.*, 316 U. S. 168, 86 Fed. 1355, and *Meredith* v. *Winter Haven*, — U. S. — —, 88 L. ed. 1.) Respondent desires to state, however, that when a decision is handed down in said case by the Oklahoma Supreme Court (same being expected shortly) he will immediately send certified copies thereof to the Clerk of this Court.

In this connection it will be noted that in the event a decision adverse to the Lincoln National Life Insurance Company (whom Amici Curiae represent) is handed down in said case, the fact that same is, as contended by respondent, *a suit against the State of Oklahoma to which the State has consented to be used in its own courts but not in the Federal courts*, will not prevent said decision, if it denies said company any right, privilege or immunity secured by the Constitution or laws of the United States, from being reviewed by this Court. In support of the above conclusion attention is called to the case of *Smith* v. *Reeves*, 178 U. S. 436-45, 44 L. ed. 1140 (referred to on page 10 of respondent's original brief herein), wherein it is stated:

"In our judgment it was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the State, and cannot be regarded as hostile to the General Government, or as touching upon any right granted or secured by the Constitution of the United States. *If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the State.*"

Said conclusion is also supported by the excerpt from the case of *Chandler* v. *Dix*, 194 U. S. 590, 48 L. ed. 1023, quoted on page 11 of respondent's original brief herein.

Argument and Authorities

FIRST PROPOSITION

THE ANNUAL TAX OF TWO PER CENT (SINCE APRIL 25, 1941, — FOUR PER CENT) COLLECTED ON THE OKLAHOMA PREMIUMS OF FOREIGN INSURANCE COMPANIES IS NOT AND NEVER HAS BEEN INVALID UNDER THE PROVISIONS OF THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT A LIKE TAX IS NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES.

The above proposition is set forth as the "Fourth Proposition" of respondent's original brief herein, argument thereunder being set forth on pages 20 to 58 of said brief, same being incorporated herein by reference.

However, by an examination of the brief of Amici Curiae it will be noted that they, *in effect, concede* that a foreign insurance company is only licensed to do business in Oklahoma for one year at a time and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein for a license year may discriminate heavily against it in favor of a competing domestic insurance company, *but that they contend*:

> (a) That an admittedly discriminatory fee or tax, such as is involved here, must be paid as a "condition precedent" to the issuance by a State of a license to do business therein for the ensuing license year, *that is, on or prior to the commence-*

ment of the exercise of the right or privilege of entering the State and doing business therein for said license year, in order to be valid under the Fourteenth Amendment, and

(b) That the admittedly discriminatory 2% (now 4%) gross premium tax involved here was not paid by the Great Northern Life Insurance Company as a "condition precedent" to the issuance by the State of Oklahoma of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the right or privilege of entering Oklahoma and doing business therein for said license year*, and hence is invalid under the Fourteenth Amendment.

In support of the above contentions Amici Curiae refer to the case of *Hanover Fire Insurance Company* v. *Carr, County Treasurer* (formerly Harding, County Treasurer), 272 U. S. 474, 71 L. ed. 372, (reviewed on pages 50 to 58 of respondent's original brief herein), and on page 26 of their brief state:

"Although the 1919 gross premium tax law of Illinois and the Oklahoma gross premium tax law here in question impose a tax measured upon gross premiums, they are radically different in operation and effect. The material portions of the Illinois law are quoted in Appendix 111. Section 13 thereof shows that the law does not in fact measure the tax on gross premiums, for the first license year. We will hereinafter illustrate and compare the operation of both laws and demonstrate that *the 1919 law of Illinois is a true license fee (condition precedent) exacted from foreign corporations before admission for the ensuing license year*, while the Oklahoma law is a

privilege tax exacted from foreign corporations *after admission* and for the license year ending at the time of payment."

Amici Curiae's
Contention "(a)"

In connection with Contention "(a)", *supra*, to-wit:

> "That an admittedly discriminatory fee or tax, such as is involved here, must be paid as a 'condition precedent' to the issuance by a State of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the right or privilege of entering the State and doing business therein for said license year*, in order to be valid under the Fourteenth Amendment.",

it will be noted that *if said contention is sound*, a state law expressly imposing a discriminatory license fee or tax on a foreign corporation for the right or privilege of entering the State and doing business therein for a period of either *one or twenty years* would be invalid under the Fourteenth Amendment unless said law requires all of said fee or tax to be paid prior to the commencement of the exercise of said right or privilege.

For example, if said contention is sound, a State law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the State and doing business therein for a period of either one or twenty years, if said law provides that one-half of said fee is payable on or

prior to the commencement of said period and the other one-half payable ten days thereafter.

In support of Contention "(a)" Amici Curiae take the position that the $200.00 "entrance fee" paid by a foreign insurance company under the provision of Section 10478 O. S. 1931 (quoted on pages 25 and 26 of respondent's original brief herein), as amended in 1941 (36 O. S. 1941 § 104), *is the only fee or tax* paid by it for the right or privilege of entering Oklahoma and doing business therein for the ensuing license year. This position is in direct conflict with the holding of the Supreme Court of Oklahoma in the case of *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936, (reviewed on pages 44 to 46 of respondent's original brief herein), where, in construing the constitutional and statutory provisions involved here, it was held:

> "In the case at bar *no lump sum* is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain percent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation *for the right or privilege to do business within the state.*"

Moreover, said annual $200.00 "lump sum" payment is not only inadequate for the privilege of doing business in Oklahoma for a year by a foreign life insurance company, *but it is not commensurate to the privilege granted*, since one company may do far more business in Oklahoma during a license year than another. It was

probably by reason of this patent fact that the annual per centage tax on premiums was required, as stated by the Oklahoma Supreme Court in the New York Life Insurance Company case,

> "for the right or privilege of doing business within the state."

Furthermore, by an examination of 28 O. S. 1941 § 111, it will be found that foreign corporations, other than insurance corporations, desiring to enter Oklahoma and do business therein for periods ranging from twenty years to perpetual existence are required to pay to the Oklahoma Secretary of State an admission fee of or tax *commensurate to the privilege conferred*, to-wit: a fee of one-tenth of one per cent of the estimated amount of capital they intend or expect to invest in Oklahoma during the then current fiscal year, and that if they thereafter invest capital in Oklahoma in excess of said estimate they are required to pay a like fee or tax thereon, that is, up to an amount not exceeding the par value of their authorized capital stock.

It is not reasonable to believe that the Oklahoma lawmakers intended to fix the admission fee of all foreign corporations, *except foreign insurance corporations*, in an amount *commensurate to the privilege given* and at the same time to fix the admission fee of insurance corporations at a "lump sum" *not commensurate to the privilege given*. In this connection attention is respectfully invited to the analysis of the case of *Philadelphia Fire Insurance Association* v. *New York*, 119 U. S. 110, 30 L. ed. 342, which appears on pages 41 to 44 of respondent's original brief herein.

Moreover, if said $200 is the only fee or tax that can be charged a foreign life insurance company for the right or privilege of entering Oklahoma and doing business therein for a license year, *said fee or tax*, under Contention "(a)", *can be validly raised at any time by the Oklahoma Legislature* from $200.00 to $20,000.00, or more. Such a tax, however, would be unfair since it would not be commensurate to the privilege granted.

Inasmuch, as certain assertions are made in the brief of Amici Curiae to the effect that the 2% (now 4%) annual premium tax involved here is not justified as a fee or tax *for proper regulatory purposes under the police power of the State*, respondent desires to clarify its position on said point by stating that if a tax is not paid by a foreign corporation for the right or privilege of entering a state and doing business therein, same, if discriminatory, is invalid under the 14th Amendment *unless* it can be justified under the police power of the State as a fee reasonably required for proper regulatory (not revenue) purposes. *However, if a tax is paid by a foreign corporation for a right or privilege of entering a state and doing business therein (as here) it may be discriminatory, and it is immaterial as to whether or not it is charged for regulatory or for revenue purposes.*

In support of said Contention "(a)" Amici Curiae apparently take the following position:

> (1) That it was by reason of the fact that the 1919 Illinois law mentioned in the *Hanover Fire Insurance Company case, supra*, (reviewed, as aforesaid, on pages 50 to 58 of respondent's original brief herein), provided that the *2% annual premium tax* paid by foreign insurance

companies doing business in Illinois was "due and payable on the first day of July" of the license year commencing on said date and ending the following June thirtieth, *that is, due and payable on or before the commencement of the exercise of the right or privilege of entering said state and doing business therein for said license year*, that said tax, although discriminatory, was held or treated as *valid* by this Court, and

(2) That it was by reason of the fact that Section 30 of the 1869 Act did not require "Every agent" of a foreign insurance company doing business in Illinois to pay the *net receipts tax* mentioned therein on the "net receipts" collected by their respective agencies during a license year "to the proper officer of the county, town or municipality in which the agency was established" on or before the issuance of a license to said company to do business in Illinois for the ensuing license year, *that is, on or before the commencement of the exercise of the right or privilege of entering said state and doing business therein for said license year*, that the net receipts tax involved in said case, which was admittedly discriminatory, was held *invalid* by this Court.

That the position of Amici Curiae is not sound is revealed by a careful reading of the Hanover Fire Insurance Company case, from which it appears that the true criterion as to whether a fee or tax is paid by a foreign corporation for the right or privilege of entering a state and doing business therein (and hence valid even though discriminatory) *is not whether said fee or tax is paid before or after the commencement of the exercise of the right or privilege but whether said fee or tax is a*

> "*burden imposed by the state* for license or privilege to do business in the state"

or a

> "*tax burden* which having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state."

In this connection respondent quotes the following pertinent language from the Hanover Fire Insurance Company case:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, *a line has to be drawn between the burden imposed by the state for license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.* With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, *the measure of the burden* is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind* * *.
>
> "*What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance com-*

> *pany is admitted to do business in Illinois,* or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character."

It will thus be noted that this Court did not hold or treat the 2% annual gross premium tax of the State of Illinois as valid by reason of the fact that the statutes of that state made said fee or tax "due and payable" by a foreign insurance company on or prior to the commencement of the right or privilege of entering Illinois and doing business therein for the ensuing license year, but because said fee or tax, even though discriminatory, was a

> "*burden imposed by the state* for license or privilege to do business in the State."

Such a tax burden, whether by the laws of the State in question made "due and payable" before or after the beginning of the ensuing license year, *is assumed* by the applicant foreign insurance company as a "condition precedent" to the issuance of a license thereto for said year.

Before closing this sub-head of our brief respondent desires to call attention to the fact that the principles of law announced therein are in harmony with the decision of the Circuit Court of Appeals in the instant case (136 Fed. (2d) 44-47), wherein it is held:

> "It is not an essential of a privilege tax that it be paid before the exercise of the privilege. *Payment*

may precede or follow the exercise of the privilege, depending on which system the legislature chooses to adopt.

"In the case of *New York Life Ins. Co.* v. *Board of County Commissioners of Oklahoma County*, 155 Okla. 247, 249, 9 P. (2d) 936, 938, 939, 944, 82 A.L.R. 1425, *the Supreme Court of Oklahoma held that the gross premiums tax* was not a tax in a constitutional sense, but *was a license fee or privilege tax for the privilege of doing business in the state.*

"It is clear, under the Oklahoma statutes, that the license of a foreign insurance company expires on the last day of February next after its issue. Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, *permit of the construction* that the payment of the gross premiums tax on or before the expiration of the license year on the last day of February *is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year.* Such has been the uniform and long-continued construction of the executive department charged with the administration of the statutes."

Amici Curiae's
Contention "(b)"

"That the admittedly discriminatory 2% (now 4%) gross premium tax involved here was not paid by the Great Northern Life Insurance Company as a 'condition precedent' to the issuance by the State of Oklahoma of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the*

right or privilege of entering Oklahoma and doing business therein for said license year, and hence is invalid under the Fourteenth Amendment."

If Amici Curiae's Contention "(a)", supra, is sound (which respondent denies) it does not follow that Amici Curiae's Contention "(b)" is likewise sound. In this connection attention is called to the fact that Sections 1 and 2, Article 19 of the Constitution of Oklahoma (quoted on pages 24 and 25 of respondent's original brief herein) *do not state when* the annual $200.00 entrance fees or the annual 2% (now 4%) gross premium taxes imposed by Section 2, *supra*, on foreign life insurance companies are to be paid. Attention is also called to the fact that 36 O. S. 1941 § 101 (quoted on page 3 of Appendix I of the brief of Amici Curiae), is not pertinent to the payment of said fees or taxes since no mention of either thereof is made in said section. However, by an examination of Section 10478 O. S. 1931 (quoted in full on pages 25 and 26 of respondent's original brief herein), as amended in 1941 (36 O. S. 1941 § 104), it will be found that same in part provides:

> "Every foreign insurance company doing business in this state under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commission, the total amount of gross premiums received in this state within the twelve months next preceding the first day of January * * * and at the same time pay the insurance commissioner an entrance fee as provided by Artiele XIX of the Constitution of the

> State of Oklahoma, *and* an annual tax of two per cent on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, * * *".

Also, by an examination of Section 10477 O. S. 1931 (36 O. S. 1941 § 56), quoted in full on page 27 of respondent's original brief herein), it will be found that same in part provides:

> "* * * if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, *he shall issue to said company a license or certificate of authority*, subject to all requirements and conditions of the law, *to transact business in this state*, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, *and said certificate shall expire on the last day of February next after its issue.*".

The above statutory provisions reveal that when a foreign life insurance company makes its report for a license year, it is "at the same time" required to pay not only its annual $200.00 entrance fee (which Amici Curiae admit is paid as a condition precedent to the issuance of a license to do business in the state for the ensuing license year) *but* a 2% (now 4%) gross premium tax on the premiums collected by it in Oklahoma, less proper deductions, during the preceding calendar year.

Said stautory provisions are *susceptible of the construction* that said annual $200.00 fee *and* said annual 2% (now 4%) gross premium tax, both of which are

required to be paid by a foreign life insurance company "at the same time" it files its report "on or before the last day of February" (said payments being made prior to the commencement of the ensuing license year), are paid as a "condition precedent" to, and as a privilege tax for, the issuance of a license thereto for the ensuing license year.

Therefore, *if Contention "(a)" is sound*, and since it is a primary rule of statuory construction (*Chicago R. I. & P. Ry. Co.* v. *Beatty*, 34 Okla. 231, 118 Pac. 367) that

> "*Where a statute is susceptible of two constructions*, one of which will uphold it, while the other will strike it down, it is the duty of the court to accept the former construction",

this Court should construe Section 10478, as amended, and Section 10477, *supra*, as requiring the payment by a foreign life insurance company *not only of said $200.00 "lump sum" fee said 2% (now 4%) gross premium tax* as a condition precedent to, and as a privilege tax for, the issuance by the state of a license thereto for the ensuing license year.

This construction, respondent realizes, leaves unsettled the question as to what privilege tax should be paid by a foreign life insurance company when it desires for the first time to enter Oklahoma and do business therein from the date of its entry to the end of the then current license year, although we assume that since it would be impossible to then require said company to pay a percentage tax on its past business (since it would have

no past business), it would only be required to pay said $200.00 "entrance fee".

SECOND PROPOSITION

THE OKLAHOMA INSURANCE COMMISSIONER DID NOT MAKE AN UNCONSTITUTIONAL OR IMPROPER APPLICATION OF THE 1941 ACT BY REASON OF THE FACT THAT HE REQUIRED FOREIGN INSURANCE COMPANIES SEEKING TO OBTAIN A LICENSE TO DO BUSINESS IN OKLAHOMA FOR THE YEAR 1942, TO PAY A FOUR PER CENT TAX ON ALL PREMIUMS, LESS PROPER DEDUCTIONS, COLLECTED BY SAID COMPANIES IN OKLAHOMA DURING THE CALENDAR YEAR, 1941.

The above proposition is set forth as the "Fifth Proposition" of respondent's original brief herein, argument thereunder being set forth on pages 58 to 63 of said brief, same being incorporated by reference herein. While said proposition is not separately discussed in the brief of Amici Curiae, same is involved therein.

This proposition, *as stated by respondent in the oral argument before this Court and as stated in our oral argument before both the District Court of Oklahoma County in the Lincoln National Life Insurance case and the United States District Court in the instant case*, presents a close question on which respondent has been unable to find a decision directly in point. We believe, however, that respondent's argument on pages 58 to 63, *supra*, of his said original brief, reasonably supports said proposition.

Also, in support of said proposition respondent desires to call attention to that part of the decision of the Circuit Court of Appeals in the instant case (136 Fed. (2d) 44-47) wherein it is stated:

> "Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, *permit of the construction* that the payment of the gross premiums tax on or before the expiration of the license year on the last day of February *is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year.* Such has been the uniform and long-continued construction of the executive department charged with the administration of the statutes. * * *
>
> "The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941, to February 28, 1942, constituted a new license year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years *and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year.*"

It will be noted, however, that in the foot-note of said case, relating to the above quoted excerpt therefrom, it is stated:

> "The question of the validity of the increase in the tax on gross premiums received *between January 1, 1941, and April 25,*

> *1941*, is not raised and we express no opinion with respect thereto."

In this connection attention is called to the fact that while the question referred to in said foot-note was raised by petitioner in its "Supplement to Complaint" (R-17-18), said question, as stated in said foot-note, was not raised by petitioner in it's brief in the Circuit Court of Appeals and is not raised in petitioner's original or reply brief in this Court. Neither is it raised by Amici Curiae.

In relation, however, to the real question raised by the instant proposition it will be noted that if the Circuit Court of Appeals was correct in holding (said holding being in conformity with the administrative interpretation of the Oklahoma Insurance Department for the past 33 years — Stip. R-20 to 22, the holding of the United States District Court in the instant case — R-29 and 30, and the holding of the Oklahoma County District Court in the Lincoln National Life Insurance Company case—R-36 and 37) that the payment of the gross premium tax involved here on or before the expiration of the license year 1941, was exacted

> "for the privilege of doing business in the state during that license year and *as a condition precedent to the issuance of a license for for the ensuing year.*",

it was proper for the Oklahoma Insurance Commissioner to require petitioner to pay said increased tax (4%) on the premiums it collected in Oklahoma, less proper deductions, during the calendar year 1941, before he

issued to it a license for the license year beginning March 1, 1942, since, as stated by the Circuit Court of Appeals:

> "It was within the power of the state to change the conditions of admission at any time as to future license years *and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year.*"

This does not mean, however, that if petitioner had not sought a license for the license year beginning March 1, 1942, it would have been required to pay a tax of 4% (rather than 2%) on the premiums it had collected during the calendar year 1941 for the privilege of having been permitted to do business in Oklahoma during the license year beginning March 1, 1941, at which time the gross premium tax was fixed at 2%, but it does mean that since petitioner sought a license for the year beginning March 1, 1942, at which time said premium tax had been increased to 4%, it was properly required to pay, as a condition precedent to securing a license for said year, a tax of 4% on the premiums it collected in Oklahoma, less proper deductions, during the calendar year 1941.

Moreover, if Amici Curiae Contention "(a)" is sound (which respondent denies, as aforesaid), it does not mean that the 4% tax for the license year beginning March 1, 1942 is invalid; since in such case Sections 10478 O. S. 1931, as amended, and Section 10477 of said statutes (the material parts of which are heretofore quoted) should be construed, as stated in respondent's argument herein under the sub-head "Amici Curiae's,

Contention "(b)", as requiring said tax to be paid as a "condition precedent" to the issuance of a license for the ensuing license year.

CONCLUSION

In conclusion respondent desires to state that he fully agrees with the proposition that a State can not lawfully require a foreign insurance company to agree to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the State. In this connection respondent has always construed that part of Section 1, Article 19 of the Constitution of Oklahoma, which provides that foreign insurance companies granted a license to do business in Oklahoma

> "shall *agree to pay* all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.",

as applying only to valid taxes or fees, such as valid ad valorem taxes on real or personal property. In this connection it will be noted that in setting forth respondent's explanation of the "Issuance of Original License" and "Issuance of License for Succeeding Years" (pages 29 to 32 of respondent's original brief herein) it was expressly stated in the concluding paragraphs, respectively, of said sub-heads that such a license when issued remains in effect to and including the next succeeding last day of February

"unless a refusal of said company to pay valid taxes or fees imposed upon it 'by law or act of the Legislature', such as a refusal to pay *valid* ad valorem taxes on its real or personal property, 'shall work a forefeiture of such license' as provided in Section 1, Article 19, *supra*."

Moreover, the State of Oklahoma is not attempting to require petitioner to pay an invalid or discriminatory tax *after it becomes and while it remains a citizen of the State*, to-wit: after it enters the State for a license year, since the premium tax involved here is required to be paid for the right or privilege of becoming a citizen of the State for said license year and not as a tax on it as a citizen thereof.

In this connection it will be noted that if said tax is payable by a foreign insurance company at the end of a license year for the privilege of having been permitted to do business in Oklahoma during said year, a failure to pay said tax will not forfeit its license since same automatically expires on the last day of said year, and if said tax is required to be paid as a condition precedent to the issuance of a license for the ensuing license year, a failure to pay said tax will not forfeit the license since same will never be issued.

In consideration of the two propositions, above presented, respondent respectfully asks the Court to affirm the decisions of the District and Circuit Courts herein, and to render judgment in favor of respondent and against petitioner.

Respectfully submitted,

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February, 1944.